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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
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10/671,370

09/25/2003

Mark E. Palm

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WHIRLPOOL PATENTS COMPANY - MD 0750
500 RENAISSANCE DRIVE - SUITE 102
ST. JOSEPH, MI 49085

EXAMINER

PERRIN, JOSEPH L

ART UNIT

PAPER NUMBER

1746

MAIL DATE

DELIVERY MODE

05/31/2007

PAPER

Please find below and/or attached an Office communication concerning this application or proceeding.

The time period for reply, if any, is set in the attached communication.

**Advisory Action
Before the Filing of an Appeal Brief**

Application No.

10/671,370

Applicant(s)

PALM ET AL.

Examiner

Joseph L. Perrin, Ph.D.

Art Unit

1746

--The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

THE REPLY FILED 21 May 2007 FAILS TO PLACE THIS APPLICATION IN CONDITION FOR ALLOWANCE.

1. ☒ The reply was filed after a final rejection, but prior to or on the same day as filing a Notice of Appeal. To avoid abandonment of this application, applicant must timely file one of the following replies: (1) an amendment, affidavit, or other evidence, which places the application in condition for allowance; (2) a Notice of Appeal (with appeal fee) in compliance with 37 CFR 41.31; or (3) a Request for Continued Examination (RCE) in compliance with 37 CFR 1.114. The reply must be filed within one of the following time periods:

- a) ☐ The period for reply expires _____ months from the mailing date of the final rejection.
b) ☒ The period for reply expires on: (1) the mailing date of this Advisory Action, or (2) the date set forth in the final rejection, whichever is later. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the mailing date of the final rejection.

Examiner Note: If box 1 is checked, check either box (a) or (b). ONLY CHECK BOX (b) WHEN THE FIRST REPLY WAS FILED WITHIN TWO MONTHS OF THE FINAL REJECTION. See MPEP 706.07(f).

Extensions of time may be obtained under 37 CFR 1.136(a). The date on which the petition under 37 CFR 1.136(a) and the appropriate extension fee have been filed is the date for purposes of determining the period of extension and the corresponding amount of the fee. The appropriate extension fee under 37 CFR 1.17(a) is calculated from: (1) the expiration date of the shortened statutory period for reply originally set in the final Office action; or (2) as set forth in (b) above, if checked. Any reply received by the Office later than three months after the mailing date of the final rejection, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

NOTICE OF APPEAL

2. ☐ The Notice of Appeal was filed on _____. A brief in compliance with 37 CFR 41.37 must be filed within two months of the date of filing the Notice of Appeal (37 CFR 41.37(a)), or any extension thereof (37 CFR 41.37(e)), to avoid dismissal of the appeal. Since a Notice of Appeal has been filed, any reply must be filed within the time period set forth in 37 CFR 41.37(a).

AMENDMENTS

3. ☐ The proposed amendment(s) filed after a final rejection, but prior to the date of filing a brief, will not be entered because
(a) ☐ They raise new issues that would require further consideration and/or search (see NOTE below);
(b) ☐ They raise the issue of new matter (see NOTE below);
(c) ☐ They are not deemed to place the application in better form for appeal by materially reducing or simplifying the issues for appeal; and/or
(d) ☐ They present additional claims without canceling a corresponding number of finally rejected claims.

NOTE: _____. (See 37 CFR 1.116 and 41.33(a)).

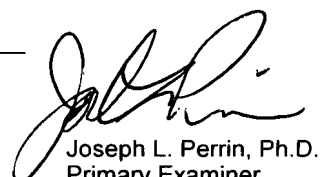
4. ☐ The amendments are not in compliance with 37 CFR 1.121. See attached Notice of Non-Compliant Amendment (PTOL-324).
5. ☐ Applicant's reply has overcome the following rejection(s): _____.
6. ☐ Newly proposed or amended claim(s) _____ would be allowable if submitted in a separate, timely filed amendment canceling the non-allowable claim(s).
7. ☐ For purposes of appeal, the proposed amendment(s): a) ☐ will not be entered, or b) ☐ will be entered and an explanation of how the new or amended claims would be rejected is provided below or appended.
The status of the claim(s) is (or will be) as follows:
Claim(s) allowed: _____.
Claim(s) objected to: _____.
Claim(s) rejected: _____.
Claim(s) withdrawn from consideration: _____.

AFFIDAVIT OR OTHER EVIDENCE

8. ☐ The affidavit or other evidence filed after a final action, but before or on the date of filing a Notice of Appeal will not be entered because applicant failed to provide a showing of good and sufficient reasons why the affidavit or other evidence is necessary and was not earlier presented. See 37 CFR 1.116(e).
9. ☐ The affidavit or other evidence filed after the date of filing a Notice of Appeal, but prior to the date of filing a brief, will not be entered because the affidavit or other evidence failed to overcome all rejections under appeal and/or appellant fails to provide a showing a good and sufficient reasons why it is necessary and was not earlier presented. See 37 CFR 41.33(d)(1).
10. ☐ The affidavit or other evidence is entered. An explanation of the status of the claims after entry is below or attached.

REQUEST FOR RECONSIDERATION/OTHER

11. ☒ The request for reconsideration has been considered but does NOT place the application in condition for allowance because:
See Continuation Sheet.
12. ☐ Note the attached Information Disclosure Statement(s). (PTO/SB/08) Paper No(s). _____.
13. ☐ Other: _____.


Joseph L. Perrin, Ph.D.
Primary Examiner
Art Unit: 1746

Continuation of 11. does NOT place the application in condition for allowance because: applicant's arguments are not persuasive.

Initially, as clearly pointed out in the Final rejection the Examiner notes that DE '214 the pipe (with nozzles 19) could arguably be construed as readable on being "spaced apart" from the disk since technically they clearly are "spaced apart". However, at this time the Examiner maintains that it would be at least obvious to provide the disk and nozzle "spaced apart" to provide the same function of directing cleaning fluid onto dishes to be cleaned. The Examiner notes that the broad term "spaced apart" reads on the slightest spacing to significant spacing as further discussed below.

In response to applicant's argument that the Examiner's conclusion of obviousness is based upon improper hindsight reasoning, it must be recognized that any judgment on obviousness is in a sense necessarily a reconstruction based upon hindsight reasoning. But so long as it takes into account only knowledge which was within the level of ordinary skill at the time the claimed invention was made, and does not include knowledge gleaned only from the applicant's disclosure, such a reconstruction is proper. See *In re McLaughlin*, 443 F.2d 1392, 170 USPQ 209 (CCPA 1971). In the instant case, clearly one having ordinary skill in the art at the time the invention was made would have found it obvious to double the number of nozzles, i.e. add a second nozzle, for the well-known advantage of improving cleaning by increasing the spray cleaning by increasing the number of nozzles. If applicant believes simply doubling the number of nozzles is a patentable modification, applicant is encouraged to clarify this by secondary considerations. However, the Examiner notes that doubling the number of nozzles to double the cleaning effect is not an unexpected result to one having ordinary skill in the art.

Re DE '214, applicant appears to take the position that the water nozzle and disk are not spaced apart whereas the claimed water nozzle and disk are spaced apart and this change is a patentable modification. Firstly, as previously noted the language "spaced apart" has immense breadth and reads on the nozzle and disk being "spaced" from each other the slightest amount (as is what appears to be the case in DE '214) to the distance being significant, such as across the dishwasher width. Moreover, both DE '214 and applicant's claimed invention provide the disk to redirect water jetted from the nozzle to be sprayed on dishes to provide a washing effect. Thus, since both provide the same function, a simple structural modification such that the disk and nozzle are "spaced apart" as discussed does not appear to provide a patentable modification. Accordingly, a simple rearrangement of spacing the structure to the extent that it reads on the broad recitation of being "spaced apart" would be well within the level and knowledge generally available to one having ordinary skill in the dishwashing art. Clearly, the invention as claimed does not read over DE '214 and is not considered patentable for at least reasons of record.

Moreover, applicant's arguments comparing the claimed invention and DE '214 in the paragraph bridging pages 4-5 of the instant response are not persuasive because they are largely directed to the intended use of each and not necessarily the structural limitations of the apparatus of each. It is well settled that claims directed to apparatus must be distinguished from the prior art in terms of structure rather than function. In *re Danly*, 263 F.2d 844, 847, 120 USPQ 528, 531 (CCPA 1959). "[A]pparatus claims cover what a device is, not what a device does." *Hewlett-Packard Co. v. Bausch & Lomb Inc.*, 909 F.2d 1464, 1469, 15 USPQ2d 1525, 1528 (Fed. Cir. 1990). (emphasis in original) Recitation of the structural limitations of DE '214 read on the claimed apparatus for reasons of record.

Regarding EP '876, applicant argues that the reference is only relevant for the disclosure of multiple spray means. The Examiner agrees and the combination of DE '214 and EP '876 renders the claims requiring multiple spray means as being an obvious modification for reasons of record.